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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First Named Applicant: Schommer)	Art Unit: 3752
)	
Serial No.: 09/901,155)	Examiner: Kim
)	
Filed: July 10, 2001)	1118.002
)	
For: WATER CONSERVING AND CLEANING)	March 21, 2005
APPARATUS)	750 B STREET, Suite 3120
)	San Diego, CA 92101
)	

APPEAL BRIEFCommissioner of Patents and Trademarks
Washington, DC 20231

Dear Sir:

This brief is submitted under 35 U.S.C. §134 and is in accordance with 37 C.F.R. Parts 1, 5, 10, 11, and 41, effective September 13, 2004 and published at 69 Fed. Reg. 155 (August 2004). This brief is further to Appellant's Notice of Appeal filed herewith.

Table of Contents

<u>Section</u>	<u>Title</u>	<u>Page</u>
(1)	Real Party in Interest.....	2
(2)	Related Appeals/Interferences.....	2
(3)	Status of Claims.....	2
(4)	Status of Amendments.....	2
(5)	Concise Explanation of Subject Matter in Each Independent Claim.	2
(6)	Grounds of Rejection to be Reviewed.....	3
(7)	Argument.....	3
App.A	Appealed Claims	
App.B	Evidence Appendix	
App.C	Related Proceedings Appendix	

1118-2 APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 2

PATENT
Filed: July 10, 2001

(1) Real Party in Interest

The real party in interest is the inventor.

(2) Related Appeals/Interferences

No other appeals or interferences exist which relate to the present application or appeal.

(3) Status of Claims

Claims 25-38 are pending and twice rejected, claims 1-24 are canceled.

(4) Status of Amendments

No amendments are outstanding.

(5) Concise Explanation of Subject Matter in Each Independent Claim, with Page and Figure Nos.

As an initial matter, it is noted that according to the Patent Office, the concise explanations under this section are for Board convenience, and do not supersede what the claims actually state, 69 Fed. Reg. 155 (August 2004), see page 49976. Accordingly, nothing in this Section should be construed as an estoppel that limits the actual claim language.

Claim 25 recites a cleaning device that has an elongated handle (12, figure 2, page 8, line 2) and an elongated hollow jet manifold (26, figure 2, page 8, line 14) that defines a transverse dimension generally perpendicular to the handle and that is engaged with a lower end portion of the handle. As plainly shown in Figure 2, no intervening structure is between the manifold and handle. Plural nozzles (36, figure 5, page

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 3

PATENT
Filed: July 10, 2001

9, first paragraph) are spaced along the jet manifold for spraying water directed into the jet manifold onto a surface. A flat forward wing (32, figure 2, id.) extends from the jet manifold above and forwardly of the nozzles such that water from the nozzles can spray beyond the forward wing during operation, and the forward wing is elongated in the transverse dimension. Also, a flat rear wing (34, id.) is elongated in the transverse dimension and has a front transverse edge that is engaged with the jet manifold. The rear wing extends rearwardly of the nozzles and terminates in a rear transverse edge. The forward wing is slanted with respect to the rear wing as shown in the figures, with the rear wing being substantially parallel to the ground when the device is being used to spray the ground. As shown in the figures, with this structure an air flow space is defined between the rear transverse edge and a surface beneath the device when the device is rollably engaged with the surface to clean the surface. Wheels (38, id.) are on the device to rollably engage the surface. According to the disclosure, the wings cooperate to establish a Venturi effect when water is sprayed onto the surface through the nozzles, and specifically air outside the jet manifold below the wings is entrained into water being sprayed from the nozzles onto the surface, thereby facilitating cleaning the surface with both the water and the air, page 10, lines 10-15.

The references in the preceding paragraph are incorporated herein. The only other independent claim (32) sets forth a cleaning device with an elongated handle, an elongated hollow jet manifold generally perpendicular to the handle and fixedly engaged with a lower end portion of the handle, and plural nozzles on the jet manifold for spraying water directed into the jet manifold onto a surface. The device further includes a flat transversely elongated forward wing extending from the jet manifold forwardly of the nozzles and a transversely elongated unitary rear wing extending from the jet manifold rearwardly of the nozzles and terminating in a rear transverse edge without further structure rearwardly of the rear transverse edge that is

1118-2APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 4

PATENT
Filed: July 10, 2001

closer to the ground during operation than the rear wing. An air flow space is defined between the rear transverse edge and a surface beneath the device when the device is rollably engaged with the surface to clean the surface. At least one wheel engaged with the device to rollably engage the surface. The wings cooperate with each other such that air outside the jet manifold between the wings and a surface being cleaned and air from behind the rear wing is entrained into water being sprayed from the nozzles onto the surface, thereby facilitating cleaning the surface with both the water and the air.

(6) Grounds of Rejection to be Reviewed on Appeal

(a) Claims 25-29 and 32-36 have been rejected under 35 U.S.C. §102 as being anticipated by Reed et al., USPN 5,548,866.

(b) Claims 32-36 have been rejected under 35 U.S.C. §102 as being anticipated by Briar, USPN 4,200,236.

(c) Claims 32-36 have been rejected under 35 U.S.C. §103 as being unpatentable over Briar.

(d) Claims 37 and 38 have been rejected under 35 U.S.C. §103 as being unpatentable over Briar in view of Nelson, USPN 4,730,786.

(e) Claims 30, 31, 37, and 38 have been rejected under 35 U.S.C. §103 as being unpatentable over Reed in view of Nelson.

(f) Claims 25-38 have been rejected under 35 U.S.C. §112, first paragraph for lacking written description.

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 5

PATENT
Filed: July 10, 2001

(7) Argument

As an initial matter, it is noted that according to the Patent Office, a new ground of rejection in an examiner's answer should be "rare", and should be levied only in response to such things as newly presented arguments by Applicant or to address a claim that the examiner previously failed to address, 69 Fed. Reg. 155 (August 2004), see, e.g., pages 49963 and 49980. Furthermore, a new ground of rejection must be approved by the Technology Center Director or designee and in any case must come accompanied with the initials of the conferees of the appeal conference, *id.*, page 49979.

(a)

Reed et al. is a Hoover carpet cleaner that is not remotely close to the claimed water broom. First, the examiner alleges that Reed et al. contains what amounts to a list of parts, without also identifying where Reed et al. teaches that the parts cooperate as claimed, which in fact they do not. Consider that the relied-upon jet manifold 656 of Reed et al. is not engaged with a lower end portion of the relied-upon handle 30, as is otherwise required by Claim 25. Consider further that the relied-upon rear wings 644, 616 of Reed et al. do not have front transverse edges engaged with the relied-upon jet manifold. Moreover, the relied-upon rear wing 616 is not elongated in the transverse dimension as claimed.

And, nowhere has the examiner shown where Reed et al. teaches anything about the wings cooperating to establish a Venturi effect as set forth in Claim 25, or that the wings cooperate with each other such that air outside the jet manifold between the wings and a surface being cleaned and air from behind the rear wing is entrained into water being sprayed from the nozzles onto the surface, thereby facilitating cleaning the surface with both the water and the air, as recited in Claim 32. This is no mere recitation of an intended

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 6

PATENT
Filed: July 10, 2001

function, but rather a recitation that patentably delimits a new and nonobvious cooperation of structure. Note that for an inherency argument to succeed, it must be shown that the reference *necessarily* functions as claimed, MPEP §2112, which Reed et al. emphatically does not appear to do. Elements 646, 644, and 616 in Reed et al. have been used as teachings of the wings, but it does not appear that these elements cooperate to produce a Venturi effect, nor does the allegation in a previous Office Action about the Venturi effect being inherent in Reed et al. mention the relied-upon "wing" elements of Reed et al. Similarly, it has not been shown that air outside the jet manifold of Reed et al. between the relied-upon "wings" and a surface being cleaned and air from behind the relied-upon "rear wing" is entrained into water being sprayed from the nozzles onto the surface, thereby facilitating cleaning the surface with both the water and the air, as recited in Claim 32.

The above observations have gone un rebutted and, hence, an admission of their correctness properly can be presumed. In lieu of rebutting Appellant's trenchant analysis the examiner has resorted to illogic, specifically, by arguing that since the claims use the open-ended term "comprising", that gives him license to ignore explicit limitations and "consider" the element 656 of Reed et al. to include all elements up to the handle and thus to be the claimed "elongate hollow jet manifold". *Note that regardless of the correctness of this last allegation, which is dealt with further below, the examiner continues to ignore the "Venturi" limitation.*

The open-ended term "comprising" signals that the claimed invention must have the recited elements as a minimum, not that the claim includes structure that is explicitly outside the language of the claim. This is where the examiner's case falls apart. If the element 656 plus all the intervening structure up to the handle is to be considered to be the claimed manifold, then it is neither elongated nor hollow. The examiner can't

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 7

PATENT
Filed: July 10, 2001

have it both ways. Furthermore, if the element 656 plus all structure up to the handle is the manifold, how does that square with the claimed recitation of the wings, since under the examiner's reading neither element 644, 616 possibly could be considered to be the rear wing?

Perhaps as importantly, just because the claim recitation is prefaced by "comprising" does not mean that the examiner is permitted to ignore MPEP §2111.01, requiring that claim terms be construed as broadly as one skilled in the art would construe them. Here, the reference itself belies the examiner's overly-expansive definition. It explicitly defines the element 656 as a "manifold", and indeed that is what the skilled artisan would describe it as. Nowhere does Reed et al. or the other references provide the slightest evidence of record that the skilled artisan would consider both the manifold 656 and all the other non-manifold stuff between it and the handle to be a "manifold". Having failed to rebut the sole evidence of record that the element 656 of Reed et al. and *only* the element 656 and no intervening structure would be understood by the skilled artisan as being a "manifold", the rejection falls.

(b)

Turning to the rejection of Claim 32 based on Briar, as now amended Claim 32 recites a unitary rear wing as shown in Figure 3 extending from the jet manifold rearwardly of the nozzles and terminating in a rear transverse edge without further structure rearwardly of the rear transverse edge that is closer to the ground during operation than the rear wing. In contrast, in Briar the combination of structure that has been relied on as the "rear wing" (top wall 11 with base plate 24 for a wheel caster) is not unitary (the base plate 24 is screwed to the front wall 12, col. 2, lines 38-40) and in any case the bristles 9 plainly are rearwardly of and closer to the ground during operation than the relied-upon "rear wing".

1118-2.APT

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 8

PATENT
Filed: July 10, 2001

Moreover, owing to the above difference in structure it does not appear that Briar's relied-upon wings cooperate as recited in the last clause of Claim 32. In fact, the relied-upon structure cannot seem to so function, because intervening structure such as the bristles 9 and pipe 40 would appear to disrupt the cooperation of structure required by the claims.

These observations again have gone unrebutted, apart from another attempted word game predicated on the above-deconstructed legal error regarding the word "comprising". Simply using the word "comprising" does not give the examiner license to engage in a word game that the evidence of record plainly shows that the skilled artisan would not engage in. Specifically, nothing on the record supports the implied contention in the rejection that the skilled artisan would regard "all elements rearward including elements 8 and 9" as part of a "rear wing". Indeed, it strains credulity to argue that the skilled artisan would regard a brush with bristles to be a "wing" at all.

Somewhat incredibly the examiner continues to allege that Appellant has failed to structurally define "rear wing". This allegation rises almost to the level of a bad faith legal position which, were it advanced in federal court, could expose an advocate to sanctions. The reason is clear. Quite the opposite of what the examiner alleges, Appellant has exhaustively and in detail defined the rear wing in Claim 32 to be "transversely elongated, unitary, extending from the jet manifold rearwardly of the nozzles and terminating in a rear transverse edge without further structure rearwardly of the rear transverse edge that is closer to the ground during operation than the rear wing, with an air flow space being defined between the rear transverse edge and a surface beneath the device when the device is rollably engaged with the surface to clean the surface".

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 9

PATENT
Filed: July 10, 2001

(c)

Continuing the pattern of presenting arguments that could merit sanction in federal court, despite holding in the previous section that Briar teaches each and every element of Claims 32-36, in this section the examiner contradicts himself, admitting that it doesn't. Specifically, the examiner admits that Briar fails to teach the absence of structure rearwardly of the rear transverse edge that is closer to the ground than the rear wing. He nonetheless decides that it would have been obvious to remove the brush 8 with bristles 9 because, per the examiner, omitting an element and its function where the remaining elements perform the same functions involves only routine skill in the art, relying on In re Karlson.

The examiner appears to be working from an outdated edition of the MPEP. The latest edition no longer cites Karlson. If the examiner wishes to cross swords on caselaw, here's a few cases from the most recent edition. Ex parte Wu, cited at MPEP §2144.04(II)(A) holds that omission of an element and its function is obvious *if the function of the element is not desired*. Nothing in Briar suggests that its brush is not desired - on the contrary, from the independent claims the brush is central to Briar. In re Larson is cited in the MPEP for the same proposition. In re Kuhle, a case much older than Wu, is cited but only for the proposition that deleting a switch in an electrical invention and thereby eliminating its function is an obvious expedient. This is an electrical case and to the extent it conflicts with the preponderance of the other two cases cited in the MPEP must be limited to its facts.

Apart from the above-noted weakness in the *prima facie* case, to the extent that it is persisted in, the previously submitted declaration convincingly establishes secondary considerations of non-obviousness which overcome the *prima facie* case. Innovators who find new ways to conserve resources and protect the

1118-2.AFP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 10

PATENT
Filed: July 10, 2001

environment are supposed to be rewarded with limited monopolies, the point of the patent system, not penalized with intransigence.

(d)

For reasons set forth above, none of the references teach or suggest either the particular structures claimed or the cooperation of structure between front and rear wings now recited in the independent claims.

Furthermore, Nelson is directed to filtering water from a faucet spout, which filtering plainly is made necessary for drinking the water. But water in the primary references is not used for drinking, only for cleaning. Accordingly, there is insufficient reason to combine the filter of Nelson with the other references because Nelson requires the filter for reasons that are not present in the other references.

Still further, the filter of Nelson is in a water spout. Nelson has no handle. So why would one be motivated to put Nelson's filter in a handle that Nelson nowhere contemplates, and not in some other part of the references sought to be modified?

Apart from the above-noted weakness in the *prima facie* case, to the extent that it is persisted in, the previously submitted declaration convincingly establishes secondary considerations of non-obviousness which overcome the *prima facie* case.

(e)

For reasons set forth above, none of the references teach or suggest either the particular structures claimed or the cooperation of structure between front and rear wings now recited in the independent claims.

1118.2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 11

PATENT
Filed: July 10, 2001

Also for reasons set forth above, there is no *prior art* suggestion to combine Nelson with either primary reference.

(f)

Appropo the allegation that the amendments do not have support in the specification, the following analysis from the MPEP is presented. MPEP §2173.05(i) advises that negative limitations and exclusionary provisos must have support in the original disclosure. The mere absence of a positive recitation is not a basis for an exclusion. However, lack of a literal basis in the original disclosure for a negative limitation may not be sufficient to establish a *prima facie* case of lack of support, referring to MPEP §2163 *et seq.* for further guidance.

Accordingly, a newly added negative limitation must be evaluated for support like any amendment, namely, by determining whether the skilled artisan would have recognized the Applicant to have possessed, at the time of filing the application, what was later claimed. For amended claims, MPEP §2163(II)(3)(b) advises that "the examiner has the burden of explaining why persons skilled in the art would not recognize in the original disclosure a description of the invention defined by the claims." The subject matter of a claim need not be described literally. MPEP §2163.02.

With the above legal guidance in mind, Applicant notes that the present drawings clearly show the claimed manifold and handle without any intervening structure. This consequently is not a case of adding a limitation to the claims that was not previously shown or described, which would otherwise trigger the requirement of showing why the invention *had* to possess the later-claimed feature. Rather, this is case of simply pointing out, with greater specificity, the structure that was clearly shown in the drawings as filed.

1118.2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 12

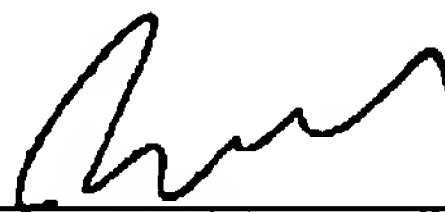
PATENT
Filed: July 10, 2001

It would seem highly unlikely that a successful explanation could be mustered as to why the skilled artisan would not have recognized Applicant's possession of the present claims, when the drawings show exactly what is now recited.

Furthermore, the higher threshold of showing the necessity of the newly added negative limitation, although not required in this case for the above reasons, nonetheless can be met by observing that the Venturi effect and concomitant water preservation features discussed on, e.g., page 10 of the specification would be severely compromised by intervening structure, which would be expected to break up the Venturi effect, further underscoring Applicant's position that the skilled artisan would indeed have recognized that Applicant possessed the subject matter now claimed.

The examiner attempts to transform the present specification's statement that the invention is limited only to the claims into a "teaching away" of the claimed invention. How can this be, when the part of the specification being relied on nowhere "teaches away" from anything, and when it in fact only recites hornbook law that the claims, and only the claims, limit the invention?

Respectfully submitted,



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1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 13

PATENT
Filed: July 10, 2001

APPENDIX A - APPEALED CLAIMS

25. A cleaning device, comprising:
an elongated handle;
an elongated hollow jet manifold defining a transverse dimension generally perpendicular to the handle, the jet manifold being engaged with a lower end portion of the handle without intervening structure between the manifold and handle;
plural nozzles spaced along the jet manifold for spraying water directed into the jet manifold onto a surface;
a flat forward wing extending from the jet manifold above and forwardly of the nozzles such that water from the nozzles can spray beyond the forward wing during operation, the forward wing being elongated in the transverse dimension;
a flat rear wing elongated in the transverse dimension and having a front transverse edge engaged with the jet manifold, the rear wing extending rearwardly of the nozzles and terminating in a rear transverse edge, the forward wing being slanted with respect to the rear wing, the rear wing being substantially parallel to the ground when the device is being used to spray the ground, an air flow space being defined between the rear transverse edge and a surface beneath the device when the device is rollably engaged with the surface to clean the surface; and
at least one wheel on the device to rollably engage the surface, wherein
the wings cooperate to establish a Venturi effect when water is sprayed onto the surface through the nozzles, wherein air outside the jet manifold below the wings is entrained into water being sprayed from the nozzles onto the surface, thereby facilitating cleaning the surface with both the water and the air.
26. The device of Claim 25, wherein the forward wing extends down from the horizontal in a longitudinal dimension that is perpendicular to the transverse dimension when the device is oriented to clean a surface beneath the device.
27. The device of Claim 25, wherein the handle is hollow and defines a fluid passageway communicating with the jet manifold, the handle including a water connector connectable to a source of water for directing water through the handle, jet manifold, and nozzles.
28. The device of Claim 27, further comprising a valve on the handle and manipulable to block the fluid passageway.
29. The device of Claim 25, wherein water flow onto the surface is no more than three gallons per minute at a water source pressure of up to eighty pounds per square inch.
30. The device of Claim 27, comprising a filter disposed in the fluid passageway of the handle.
31. The device of Claim 30, wherein said filter is frusto-conical shaped.

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 14

PATENT
Filed: July 10, 2001

32. A cleaning device, comprising:
an elongated handle;
an elongated hollow jet manifold generally perpendicular to the handle, the jet manifold being fixedly engaged with a lower end portion of the handle;
plural nozzles on the jet manifold for spraying water directed into the jet manifold onto a surface;
a flat transversely elongated forward wing extending from the jet manifold forwardly of the nozzles;
a transversely elongated unitary rear wing extending from the jet manifold rearwardly of the nozzles and terminating in a rear transverse edge without further structure rearwardly of the rear transverse edge that is closer to the ground during operation than the rear wing, an air flow space being defined between the rear transverse edge and a surface beneath the device when the device is rollably engaged with the surface to clean the surface;
at least one wheel engaged with the device to rollably engage the surface, wherein the wings cooperate with each other such that air outside the jet manifold between the wings and a surface being cleaned and air from behind the rear wing is entrained into water being sprayed from the nozzles onto the surface, thereby facilitating cleaning the surface with both the water and the air.
33. The device of Claim 32, wherein the forward wing extends down from the horizontal in a longitudinal dimension when the device is oriented to clean a surface beneath the device.
34. The device of Claim 32, wherein the handle is hollow and defines a fluid passageway communicating with the jet manifold, the handle including a water connector connectable to a source of water for directing water through the handle, jet manifold, and nozzles.
35. The device of Claim 34, further comprising a valve on the handle and manipulable to block the fluid passageway.
36. The device of Claim 32, wherein water flow onto the surface is no more than three gallons per minute at a water source pressure of up to eighty pounds per square inch.
37. The device of Claim 34, comprising a filter disposed in the fluid passageway of the handle.
38. The device of Claim 37, wherein said filter is frusto-conical shaped.

1118-2APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 15

PATENT
Filed: July 10, 2001

APPENDIX B - EVIDENCE

Declaration of Harlan Delzer

1118-2.APP

CASE NO.: 1118.002
Serial No.: 09/901,155
March 21, 2005
Page 16

PATENT
Filed: July 10, 2001

APPENDIX C - RELATED PROCEEDINGS

None (this sheet made necessary by 69 Fed. Reg. 155 (August 2004), page 49978.)

1118-2.APP

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P. 02

1. My name is Harlan D. Delzer and I am employed as a Water Resources Analyst, working with water conservation issues at Inland Empire Utilities Agency (IEUA or Agency). The Agency encompasses 242 square miles, providing water service and wastewater treatment service to more than 700,000 people, and nearly 300,000 head of cattle. There are many water and water quality-related challenges within IEUA's service area.
2. My experience within IEUA spans nearly 18 years. I was originally hired, in 1986, as a Senior Chemist in the Agency's laboratory. Since then, I have held six additional titles across a broad spectrum of work responsibilities. Most recently, serving in the capacity of Water Resources Analyst, I have been asked to evaluate many water conservation appliances and tools. I currently manage two water conservation rebate programs (one for high efficiency clothes washers and another for swimming pool covers) and will soon be launching a third one associated with the installation and use of weather-based landscape irrigation controllers that "self-adjust" in response to weather conditions.
3. The WaterMiser WaterBroom, accurately depicted in Figures 2 and 3 of Mr. John Schommer's patent application, is a very effective tool that focuses on the efficient use of water while performing as a useful cleaning device. I have personally used the WaterBroom to clean concrete sidewalks, outdoor eating areas for elementary schools, and outdoor study areas at high schools within the IEUA service area. It performs these tasks faster, more efficiently, and more completely while using far less water than the "normal" high pressure, high velocity water hoses used in the past. More importantly, here in Southern California, it uses significantly less water. Thus, the WaterBroom provides superior results on three "fronts" simultaneously:
 - As a superior cleaning tool
 - As an effective water conservation device
 - As a versatile urban runoff mitigation system
4. The principal reason, in my opinion, for WaterBroom's effectiveness is the front and rear "wings" which extend transversely across the length of the WaterBroom. While not touching the ground, or the debris being cleaned from the surface under, and in front of the WaterBroom, these wings entrain, control, and direct a powerful stream of moving air. The air is mixed with, and accelerated by the pressurized water misting from multiple sprayers under the wing. The combined air and water mixture provides the "mechanical force" to perform the cleaning more effectively, and while using less water than any other device I have ever used.
5. Because of the superior performance described above, IEUA has, for two consecutive years incorporated the WaterBroom into its water conservation program. During Fiscal Year 2002/2003 we purchased and distributed enough WaterBrooms to provide at least one to each police station and fire station within the seven cities incorporated within the IEUA service area (80 stations in all). Then, during Fiscal Year 2003/04, the Water Resources Department purchased

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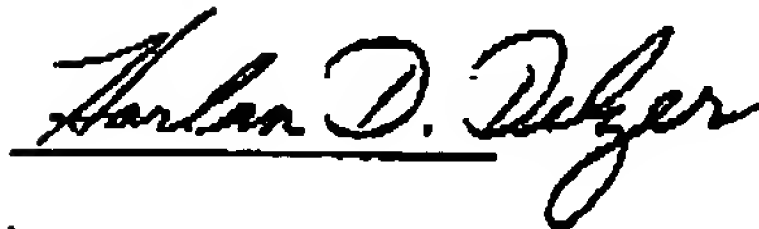
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P. 03

approximately 225 more. These were distributed to all of the schools (elementary schools, middle schools, high schools, and some private schools) within the Agency's 242 square-mile service area. During Fiscal Year 2004/2005 the plan is to begin providing WaterBrooms to restaurants (with outdoor seating) that are required, by Health Department Codes and city Ordinances, to "wash-down" daily. The anticipated water saving has been estimated as approaching 50,000 gallons per year for each WaterBroom. IEUA is projecting a minimum purchase of 300 WaterBrooms for its FY 04/05 water conservation program. I anticipate IEUA will be purchasing and distributing at least 300 units per year in the future, as well; there are more than 6000 restaurants within the Agency's service area.

6. The WaterMiser WaterBroom is a very effective and versatile piece of equipment. My experience, within the water conservation "world" leads me to conclude that the WaterBroom meets a long-felt, and yet heretofore unmet, need for a pressurized water cleaning device that simultaneously cleans well, conserves potable water supplies, protects groundwater, and limits urban runoff. No other product, that I am familiar with, satisfies the market's needs better.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United State Code and that such willful, false statements may jeopardize the validity of the application or any patent issued thereon.



Harlan D. Delzer
Water Resources Analyst
Inland Empire Utilities Agency

FROM ROGITZ 619 338 8078

(MON) MAR 21 2005 12:59/ST. 12:54/No. 6833031668 P 22

APR-07-2004 WED 03:48 PM

FAX NO.

F. 04

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